

NEW TITLE IX REGULATIONS

AGG
IESDO

Melissa Holloway, General Counsel
Board of Trustees Retreat
6/18/2020



NEW TITLE IX REGULATIONS

Where do we go from here?

- The Proposed Regulations were issued in 2018 and there are significant and meaningful changes between the Proposed and Final Regulations issued on May 6, 2020
- Released 100 days before the effective date of August 14, 2020
- The Final Rule is incredibly long and complicated – 2,033 pages
- The University has thoroughly reviewed and studied the new rules to determine next steps



2,000-page Preamble in response to the 124,000 public comments

NEW TITLE IX REGULATIONS

Where Do We Go From Here?

- OLA/T9 expects that the Final Rules will be the subject of multiple legal challenges, which could impact the timeframe for compliance with the Rule
- OLA/T9 will monitor and keep University leadership apprised of any developments in national or regional litigation
- Any required changes to the A&T's policies must be made in coordination with institutional stakeholders (including faculty and staff)
- Some instances of sexual conduct will not fall within the Final Rule, and they will continue to be addressed by other policies, such as the Student Code of Conduct

BACKGROUND

Historical Context

- Obama Administration
 - > Issued Title IX guidance in 2011 and 2014
- Trump Administration
 - > Rescinded Obama guidance
 - > Issued interim guidance in 2017
 - > Published proposed rules on November 29, 2018
 - > Released final rules on May 6, 2020
- Final Rules
 - > Final rules are similar to proposed rules
 - > Require supportive services for survivors
 - > Provide new procedural protections for accused students

NEW TITLE IX REGULATIONS

Scope of the Changes

- Most significant change in Title IX regulations in the history of the Title IX law and its impact affects every facet of University operations, including:
 - > expanding the jurisdiction of Title IX to include employees, and requiring the same standard of proof for students and employees including faculty;
 - > mandating that the parties are provided an advisor, which may be a lawyer, and providing the right to cross examine witnesses, including the parties and providing both parties the opportunity to appeal the decisions; and
 - > narrowing what is defined as a Title IX violation. In so doing, the rule excludes study abroad programs and leaves to the University the decision to regulate sexual misconduct occurring abroad.

NEW TITLE IX REGULATIONS

Key New Provisions

- Definition of Sexual Harassment
- Actual Knowledge
- Sexual Harassment Jurisdiction.
- Posting of Training Sessions and Prominent Display of Title IX Coordinator Contact
- Mandatory Response Obligations and the Deliberate Indifference Standard
- The Title IX Grievance and Hearing Process

NEW TITLE IX REGULATIONS

Key New Provisions

- Investigations
- Standard of Evidence
- Informal Resolution
- Retaliation Prohibited

NEW TITLE IX REGULATIONS

Key New Provisions

- Required to allow cross-examination, *by advisors*, of the complaining and responding parties, as well as any witnesses, during a live hearing led by institution officials. University must provide trained advisors for student who do not have one
- Only obligated to respond to reports of sexual harassment that occurred off-campus if the location is in use by an officially recognized student or institution organization

NEW TITLE IX REGULATIONS

Key New Provisions

- Colleges will be able to determine whether to use a “preponderance of the evidence” or “clear and convincing” standard as a burden of proof and must use the same standard for all complaints, ***no matter if they involve student or faculty misconduct***
- The definition of sexual harassment is more narrow. It is defined as “***any unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive that it denies a person equal educational access.***” Reports of sexual assault, dating violence, domestic violence and stalking do not need to meet the description of “severe, pervasive and objectively offensive”

NEW TITLE IX REGULATIONS

Key New Provisions

- Stalking, domestic violence and dating violence are now officially considered examples of sexual harassment under Title IX
- No longer obligated to handle complaints of sexual harassment that occurs outside the United States. This means any harassment or assault that happens in programs/study abroad would not be covered by Title IX, but the new regulations say institutions “remain free” to apply misconduct policies for programs abroad if they so choose
- University must have actual knowledge of a harassment through (1) Title IX Coordinator or (2) any official of the school who has authority to institute corrective measures, or (3) to any employee of an elementary and secondary school

NEW TITLE IX REGULATIONS

Key New Provisions

- If a Title IX coordinator receives multiple informal complaints of harassment against a single respondent, they will not be required to begin a formal complaint process
- Colleges can no longer use a “single investigator model,” which has one official tasked with investigating, adjudicating and issuing disciplinary sanctions against respondents. The regulations instead require separate officials to work through separate pieces of a single Title IX complaint process: a Title IX coordinator, who receives reports of sexual misconduct; an investigator, to gather facts and interview parties and witnesses; and a decision maker, to determine sanctions and remedies for parties

NEW TITLE IX REGULATIONS

Key New Provisions

- Colleges must train all personnel involved in the Title IX process and publish training materials on their websites. Training must involve review of the new rule's definition of sexual harassment and the scope of the application of Title IX to college programs and activities, how to conduct a formal or informal process, and how to “serve impartially,” including avoidance of “prejudgment of the facts at issue, conflicts of interest, and bias”
- Title IX processes may be conducted virtually, and staff must be trained on relevant technology to conduct remote investigations and hearings

NEW TITLE IX REGULATIONS

Key New Provisions

- Colleges *must provide evidence related to allegations* to parties and advisers at least 10 days prior to requiring a response, and parties will not be prohibited from speaking about the allegations. This means doing away with “gag orders”
- Colleges are *not obligated to follow a specific time frame* for responding to reports of sexual misconduct. They are instead required to have “reasonably prompt” periods for carrying out each step in the Title IX complaint process

NEW TITLE IX REGULATIONS

Required Notifications

- University's notification requirement has expanded
- University must designate one employee as Title IX Coordinator and must provide that individual's name, office address, email, and telephone number to:
 - > Applicants for admission;
 - > Applicants for employment;
 - > Current students;
 - > Current employees; and
 - > Parents or legal guardians of elementary and secondary school students.

NEW TITLE IX REGULATIONS

Key Questions to Guide Policy Review and Revision

- Who is a “responsible employee” to whom notice triggers the institution’s Title IX response obligations?
- What is sexual harassment for purposes of Title IX enforcement?
- What sexual harassment allegations must be investigated using the T9 p?
- How will the pre-hearing Title IX adjudication process be different?
- Can any disciplinary measures be imposed before the hearing?
- What requirements will apply to the hearings?
- What standard of proof must be applied to proceedings?
- Do we need to provide written decisions?
- What appeal rights must be offered?

NEW TITLE IX REGULATIONS

Next Steps

- Communication to campus community regarding scope and timeline for changes
- Convene working groups from relevant functional areas – OLA, Title IX, Student Affairs, Academic Affairs, Human Resources, faculty/staff senate, and student leadership
- Draft, review, and revise policies for public comments consistent with the University Policy on Policies
- Consultation with UNC General Administration and Office of State Human Resources (OSHRA)
- Develop updated Title IX resource website

NEW TITLE IX REGULATIONS

Next Steps

- Revise and enhance Title IX training
- Revise University communications to current/future students and employees to include updated language
- Determine new resource needs (i.e. provision of advisors)
- Develop and deliver revised training for adjudication bodies for faculty, staff, and students

